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No. 90-5319

In the Supreme Court of the United States

OCTOBER TERM, 1990

PAUL MCNEIL, PETITIONER

v.

STATE OF WISCONSIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether law enforcement officers may initiate custodial interrogation of a suspect who is represented by counsel on an unrelated offense.

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INTEREST OF THE UNITED STATES

This case presents the question whether the police should be barred from initiating custodial interrogation of a suspect who is represented by counsel on a separate charge. The Court's resolution of this question will affect the conduct of interrogations by federal law enforcement officers and the admission of voluntary statements by defendants in federal criminal prosecutions. In addition, the Court's disposition of this case will affect the admissibility in federal prosecutions of statements obtained by state and local law enforcement officers in circumstances similar to those in this case.[1]

[1] The issue presented in this case has arisen in several recent federal prosecutions. See *United States* v. *Hall*, 905 F.2d

STATEMENT

1. Petitioner was arrested in Omaha, Nebraska, pursuant to a criminal complaint and warrant charging him with an armed robbery in West Allis, Wisconsin. On May 20, 1987, while petitioner was in custody in the Omaha jail, two Milwaukee County, Wisconsin, deputy sheriffs, after advising petitioner of his *Miranda* rights, sought to question him. Petitioner declined to answer questions, but he did not invoke his right to counsel. The deputies promptly ended the interview. J.A. 5-6, 17.

On May 21, 1987, the deputies escorted petitioner from Omaha to Milwaukee. During the trip, the deputies advised petitioner that it would be to his advantage to tell his side of the story, but they did not attempt to question him. J.A. 17.

The next day petitioner appeared before a Milwaukee County Judicial Court Commissioner on the armed robbery charge. The Commissioner set bail and scheduled a preliminary hearing. Petitioner was represented at the initial appearance by an attorney from the public defender's office. J.A. 7-11. Later that evening, Detective Joseph Butts of the Milwaukee County Sheriff's Department visited petitioner in the Milwaukee County Jail. Detective Butts advised petitioner of his *Miranda* rights, and petitioner signed a waiver form. J.A. 12-13. Petitioner then said, "I guess you want to talk to me about this thing in Caledonia." Oct. 5, 1987, Tr. 14. Detective Butts replied that he did. The detective then proceeded to question petitioner about a murder and

959 (6th Cir. 1990), petition for cert. pending, No. 90-5706; *United States* v. *Wolf*, 879 F.2d 1320 (6th Cir. 1989); *United States* v. *Roberts*, 869 F.2d 70 (2d Cir. 1989); *United States* v. *Wright*, appeal pending, No. 90-30279 (9th Cir.).

burglary that had occurred in Caledonia, Wisconsin —offenses that were entirely separate from the West Allis armed robbery on which petitioner had been charged. *Id.* at 14-15.

Petitioner, who remained in custody, was questioned again by Detective Butts and other officers on May 24 and May 26 with regard to the Caledonia offenses. Petitioner was advised of his rights and signed a waiver form before each interrogation session. In the course of the questioning, petitioner confessed his involvement in the Caledonia murder and burglary. J.A. 17.

2. On May 27, 1987, the district attorney issued a criminal complaint charging petitioner with first degree murder, attempted first degree murder, and armed burglary in connection with the Caledonia incident. Petitioner moved to suppress his statements, but the trial court denied the motion. Thereafter, petitioner was convicted, on his plea of no contest, of being a party to the crimes of second degree murder, attempted first degree murder, and armed burglary.[2] He was sentenced to 60 years' imprisonment. J.A. 24.

On appeal, petitioner contended that his statements of May 22, 24, and 26 should have been suppressed. He argued that his appearance with counsel at the initial hearing on the armed robbery charge was an invocation of his right to counsel under the Fifth

[2] After his conviction, petitioner moved to withdraw his plea, arguing that his counsel had been ineffective in failing to cite *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117 (7th Cir. 1987), in support of the motion to suppress petitioner's statements. The trial court denied petitioner's post-conviction motion, concluding that its decision on the suppression motion "would have been the same even if that case [had] been argued." J.A. 15.

Amendment that precluded all further police-initiated interrogation concerning either the charged offense or any uncharged offense. The Wisconsin Court of Appeals certified the appeal to the Wisconsin Supreme Court. J.A. 16-22. The court of appeals noted that while "several United States Supreme Court cases offer a measure of direction on the resolution of this case, * * * none answers it completely." *Id.* at 21-22.

3. The Wisconsin Supreme Court upheld the trial court's denial of petitioner's suppression motion and affirmed petitioner's convictions. J.A. 23-45. The court recognized that the Fifth and Sixth Amendments afford "two distinct rights to counsel when a defendant is interrogated by the police." J.A. 27. As to the Sixth Amendment right, the court noted that petitioner had not been charged with the Caledonia murder or burglary at the time of the interrogations, and that his Sixth Amendment right to counsel therefore had not yet attached. The court explained that an invocation of the Sixth Amendment right with respect to a charged offense does not prohibit interrogation on other, uncharged offenses. J.A. 27-28.

The Wisconsin Supreme Court also rejected petitioner's contention that simply by appearing with counsel, petitioner had invoked his right not to be questioned on any subject without counsel. J.A. 30-33. Noting that a defendant at an initial appearance "is not being subjected to interrogation," the court concluded that "there is no fifth amendment right to counsel at an initial appearance." J.A. 30. The court stated that when a defendant has accepted the appointment of counsel at an initial appearance during which he is not subject to interrogation, "it is difficult to see what 'subtle compulsion' would exist if the police were to approach the defendant and seek to

interrogate him on an unrelated crime after providing a full warning of his *Miranda* rights, including the right to counsel." J.A. 31. The court concluded that "[t]he 'ordinary meaning' of a defendant's request for counsel at the initial appearance is only that he is invoking his sixth amendment right to counsel in the pending prosecution." J.A. 33 (quoting *Connecticut* v. *Barrett*, 479 U.S. 523, 530 (1987)).

Three justices dissented. J.A. 41-45. They saw no reason to "distinguish[] between a defendant who makes a request for assistance of counsel to a police officer while subject to a custodial interrogation and a defendant who makes a request for assistance of counsel to a magistrate and thereafter remains in continuous custody." J.A. 42. Accordingly, the dissenting justices concluded that after a defendant in custody accepts the appointment of counsel in connection with a charged offense, police officers may not thereafter seek to question him with respect to any crime, charged or uncharged. J.A. 42-43.

SUMMARY OF ARGUMENT

When petitioner was formally charged with armed robbery, his Sixth Amendment right to counsel attached with respect to that offense. Under this Court's decision in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), a defendant's request for the appointment of counsel on a charged offense is construed as an invocation of his Sixth Amendment right to counsel at all critical stages of the proceedings on that charge, including police interrogation. Moreover, under the rule the Court announced in *Jackson*, once the defendant requests the appointment of counsel, the police are prohibited from initiating further interrogation of the defendant or even seeking a waiver

of his right to counsel on the charged offense. But nothing in *Jackson* or any other decision of this Court bars police-initiated questioning of a represented defendant on unrelated offenses with which the defendant has not been charged.

1. The Sixth Amendment affords no basis for petitioner's claim. Petitioner's right to counsel under the Sixth Amendment attached only "at or after the initiation of adversary judicial criminal proceedings —whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). At the time of petitioner's interrogation, the State had not charged petitioner with murder, let alone initiated adversary judicial proceedings on that charge. Consequently, petitioner's Sixth Amendment rights as to that offense had not attached. Although petitioner's Sixth Amendment rights *had* attached as to the armed robbery with which he had been charged, this Court has never held that the commencement of adversary proceedings on one charge bars law enforcement officers from questioning the defendant concerning uncharged offenses. On the contrary, the Court has said that excluding evidence pertaining to charges as to which the Sixth Amendment right has not attached, merely because other charges were pending, would "unnecessarily frustrate the public's interest in the investigation of criminal activities." *Maine* v. *Moulton*, 474 U.S. 159, 180 (1985). See also *Moran* v. *Burbine*, 475 U.S. 412, 431 (1986).

2. Petitioner seeks to achieve precisely the result that the Court rejected in *Moulton* and *Burbine* by arguing that acceptance of counsel on a charged offense is sufficient to bar all subsequent police-initiated custodial interrogation concerning any unrelated offense, no matter how remote from the charged offense. He relies on *Edwards* v. *Arizona*, 451 U.S. 477 (1981), in which this Court adopted a prophylactic rule that forbids police from approaching a suspect who has invoked his right to counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in an effort to obtain a waiver of that right. *Edwards* and its progeny, however, do not require the kind of blanket prohibition on police investigation that petitioner seeks in this case.

The Court has emphasized that the prophylactic rule of *Edwards* protects the individual's right to choose whether to speak with law enforcement officers. Accordingly, the accused must "actually invoke[] his right to counsel." *Smith* v. *Illinois*, 469 U.S. 91, 95 (1984) (per curiam). Petitioner's mere appearance with counsel at a court proceeding on the West Allis armed robbery charge should not be construed as an invocation of his Fifth Amendment right to counsel at subsequent interrogations on unrelated offenses. Nothing about petitioner's decision to be represented by counsel in connection with the armed robbery charge suggests that he also wished to invoke his right not to be questioned in the absence of counsel with respect to wholly separate matters. More generally, there is nothing about the decision to be represented by counsel in a pending criminal case that would justify a conclusive presumption that such a decision is equivalent to a request for counsel in connection with any future custodial interrogation on any subject.

Neither *Michigan* v. *Jackson* nor *Arizona* v. *Roberson*, 486 U.S. 675 (1988), requires a different result. *Jackson* applied the rule of *Edwards* in the Sixth Amendment context. Because petitioner's Sixth Amendment rights on the murder charge had not at-

tached at the time of the interrogation, *Jackson* does not apply to this case. In *Roberson*, the suspect unquestionably invoked his right to counsel under *Miranda* v. *Arizona* by stating that he "wanted a lawyer before answering any questions." 486 U.S. at 678. The only question in that case was whether that invocation of the *Miranda* right should be applied only to the offense that was the subject of the questioning or, instead, to any police efforts to question the suspect while he was in custody. Although the Court decided that the policies underlying the Fifth Amendment and the *Miranda* decision require the broader construction, that conclusion does not suggest that a defendant who accepts or requests legal representation in a criminal case must be deemed to have invoked his right to counsel with respect to custodial interrogation on any subject.

Finally, the balance of costs and benefits does not justify the creation of a new prophylactic rule to prohibit all custodial interrogation whenever a suspect is a defendant in a criminal case. The cost of the rule petitioner advocates would be high: the rule would exclude from evidence reliable statements obtained during custodial interrogation of suspects on any subject, as long as the suspects were charged and represented in connection with some crime in some jurisdiction at the time of the interrogation. By contrast, the benefit of the rule in protecting against coercive interrogation tactics would be negligible. The fact that a person has been charged with and is represented in connection with an unrelated crime is not likely to make that person more vulnerable to the coercive effects of custodial interrogation than a person who is merely a suspect as to the unrelated offense.

ARGUMENT

THE COURT SHOULD NOT CREATE A PER SE RULE AGAINST POLICE-INITIATED INTERROGATION OF SUSPECTS WHO ARE REPRESENTED BY COUNSEL ON AN UNRELATED CHARGE

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. To counteract those pressures, the Court devised a set of prophylactic rules intended to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court announced an additional prophylactic rule for cases in which the suspect invokes his right to have counsel present during custodial interrogation. The Court held that, following such a request, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485. Most recently, in *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), the Court has construed the rule of *Edwards* to bar police reinitiation of questioning even after the suspect has had an opportunity to consult with counsel.

Petitioner asks the Court to create a new prophylactic rule in this case that would extend the per se rule of *Edwards* to prohibit law enforcement officers from questioning a suspect who has accepted the appointment of counsel to represent him on unrelated charges. We submit that such a rule would be un-

warranted under both this Court's precedents and the general principles of interrogation law.

1. As an initial matter, the interrogation in this case plainly did not violate petitioner's Sixth Amendment rights.[3] The right to counsel afforded by the Sixth Amendment attaches only "at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). See also *Moran* v. *Burbine*, 475 U.S. 412, 428 (1976) (Sixth Amendment attaches at "the first formal charging proceeding"). That principle is consistent with the "core purpose" of the Sixth Amendment right to counsel, which is to ensure the assistance of counsel at trial and at critical pretrial proceedings in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 188-189 (1984).

At the time of his interrogation, petitioner's Sixth Amendment right to counsel on the Caledonia murder and burglary offenses had not yet attached. Not only had there been no adversary judicial proceedings concerning those offenses, but the State had not even

[3] Petitioner implicitly concedes as much by framing his argument exclusively in Fifth Amendment terms. His petition states the question presented as whether a suspect's initial appearance with counsel "on a charged offense of armed robbery [was] an invocation of [petitioner's] *fifth amendment* right to counsel that precluded police initiated interrogation on an unrelated, uncharged homicide * * *." Pet. i (emphasis added). See also Pet. Br. i.

arrested petitioner for the murder or burglary.[4] Petitioner had been charged with an unrelated armed robbery, and he had made an initial court appearance with counsel on that charge. Consequently, petitioner's Sixth Amendment rights had attached with respect to the charged offense. And under this Court's decision in *Michigan* v. *Jackson*, 475 U.S. 625 (1980), petitioner's acceptance of appointed counsel at his initial court appearance on the armed robbery charge prohibited subsequent interrogation on the charged offense. But this Court has never held that a defendant's assertion of the Sixth Amendment right to counsel extends to uncharged, unrelated offenses. On the contrary, the Court has said that interrogation concerning uncharged offenses does not violate a suspect's Sixth Amendment right to counsel, even though the suspect has been charged with other crimes.

In *Maine* v. *Moulton*, 474 U.S. 159 (1985), for example, the Court said:

> To exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was ob-

[4] Petitioner asserts that a Caledonia police officer "had in his own estimate sufficient information" to arrest petitioner for the murder prior to the interrogations, Pet. Br. 3, and had filled out a felony warrant request (but had not submitted it to the District Attorney's Office) four days before petitioner's court appearance on the armed robbery charge. *Id.* at 5. The police officer's actions plainly did not mark the beginning of adversary judicial proceedings on the murder charge. This Court "has never held that the [Sixth Amendment] right to counsel attaches at the time of arrest." *United States* v. *Gouveia*, 467 U.S. at 190. *A fortiori*, the Sixth Amendment right to counsel does not attach when an individual police officer forms the belief that there is sufficient information to seek an arrest warrant.

> tained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. * * * Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

Id. at 180 & n.16. See also *Moran* v. *Burbine*, 475 U.S. at 431 (government may not interrogate defendant out of the presence of counsel on a charged offense, but is free to obtain evidence regarding an uncharged offense "in precisely the same manner from the identical suspect"); *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964) (proper for government to continue investigation of suspected drug ring following indictment of defendant, although defendant's incriminating statements cannot be admitted against him at the trial on the charged offense).

2. Petitioner contends that his initial appearance with counsel should be treated as an invocation of his Fifth Amendment privilege against compulsory self-incrimination, and in particular his right under *Miranda* not to be questioned without counsel even with respect to uncharged offenses. In practice, the new prophylactic rule that petitioner proposes would result in precisely the same frustration of "the public's interest in the investigation of criminal activities" that the Court referred to in *Moulton*. 474 U.S. at 180. That cost might be justified if petitioner's proposed rule significantly advanced or protected Fifth Amendment interests. But the rule would not have that effect.

a. The "fundamental purpose" of the prophylactic rules adopted in *Miranda* and *Edwards* is "to assure

that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process." *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987) (quoting *Miranda*, 384 U.S. at 469) (emphasis added by Court in *Barrett*). In keeping with that fundamental purpose, the Court has made clear that the Fifth Amendment privilege against compulsory self-incrimination and the related right, recognized in *Miranda*, to have counsel present during custodial interrogation are not self-executing. See *Moran* v. *Burbine*, 475 U.S. at 433 n.4 (*Miranda* did not "creat[e] an undifferentiated right to the presence of an attorney that is triggered automatically by the initiation of the interrogation itself"). Instead, a basic requirement for application of the *Edwards* rule is that the accused must "actually invoke[] his right to counsel" by "stat[ing] that he wants an attorney." *Smith* v. *Illinois*, 469 U.S. 91, 95 & n.2 (1984) (per curiam). See also *Michigan* v. *Mosley*, 423 U.S. 96, 104 n.10 (1975).

Nothing about petitioner's routine appearance with counsel at the initial hearing on the armed robbery charge suggests that petitioner actually "consider[ed] himself unable to deal with the pressures of custodial interrogation without legal assistance," *Arizona* v. *Roberson*, 486 U.S. at 683 (stating the test for an invocation of the right to counsel in the interrogation setting). Neither petitioner nor his counsel said anything at that proceeding with respect to interrogation. *Michigan* v. *Jackson*, of course, treats a request for representation by counsel as a bar to police-initiated post-indictment interrogation with respect to the charged offense, but that is because a defendant's decision to be represented by

counsel is interpreted to reflect a desire to be represented by counsel at every critical phase of *that case*.[5]

The fact that petitioner apparently chose to be represented by counsel on the robbery charge cannot be treated as an invocation of his Fifth Amendment rights as to uncharged and unrelated offenses.[6] It is true that this Court has said that principles of waiver favor "a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Michigan* v. *Jackson*, 475 U.S. at 633. The Court has also suggested that an accused "should not be expected to articulate exactly why or for what purposes he is seeking counsel." *Id.* at 633 n.7 (quoting *State* v. *Jackson*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)). But that statement does not mean that the

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[5] This case does not turn on whether a suspect may invoke his right to counsel at interrogation only after law enforcement officers read him the *Miranda* warnings and ask whether he is willing to answer questions. Assuming that a suspect may invoke his right not to be questioned outside the presence of counsel at any time while he is in custody (and therefore that petitioner could have invoked his *Miranda* rights for all purposes at the initial appearance on the armed robbery charge), petitioner never indicated in any way that he wanted counsel to be present during any or all subsequent custodial questioning on unrelated offenses.

[6] The record shows only that petitioner appeared with counsel at his initial hearing. While there is no indication that petitioner explicitly requested representation, we have treated petitioner's apparent acceptance of counsel for purposes of the initial appearance as legally equivalent to an affirmative request to be represented by counsel at least for purposes of that proceeding, and we accept, *arguendo*, that petitioner's election to be represented at the initial appearance should be treated as legally equivalent to the request for representation made by the defendant in *Jackson*.

invocation of the right to counsel for one purpose invariably constitutes the invocation of the right to counsel for all purposes.

The Court invariably faces a line-drawing problem in deciding how broadly to construe conduct that evinces a desire for legal representation. In the context of this case, we submit that the line should be drawn as follows: where the suspect has done no more than request or accept representation on one charge, that conduct should be deemed to invoke the defendant's right to counsel for purposes of interrogation with respect to the charged offense, but not as to interrogation on other subjects.

As this Court has recognized, there are significant differences between representation by counsel after the government has initiated formal adversary proceedings and representation at custodial interrogation before adversarial proceedings commence. "[A]t trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more." *Patterson* v. *Illinois*, 487 U.S. 285, 299 n.13 (1988). In contrast, the Court has noted, the " 'dangers and disadvantages of self-representation' during questioning are less substantial and more obvious to an accused than they are at trial," and "the role of counsel at questioning is relatively simple and limited." *Id.* at 299 (quoting *Faretta* v. *California*, 422 U.S. 806, 835 (1975)). Thus, an accused might well request or accept representation on pending charges without feeling in any way unequal to the task of answering questions from the police on unrelated, uncharged offenses. And since the dangers and disadvantages of self-repre-

sentation during questioning are relatively obvious, the reasons for construing requests for counsel broadly are far less persuasive in this context.

A suspect who is represented by counsel on pending charges, like other suspects in custody, needs no technical legal knowledge about the scope of his Fifth and Sixth Amendment rights in order to decide, after hearing the *Miranda* warnings, whether he wishes to answer questions concerning an unrelated offense. Indeed, a suspect without specialized legal knowledge would likely be surprised to be told that by retaining or accepting the appointment of counsel on a charged offense, he is presumed as a matter of law to have indicated that he feels unable to answer questions from law enforcement officers concerning uncharged and unrelated offenses. For that reason, a suspect who is represented by counsel in another case is not likely to feel that he is being badgered, or that his invocation of rights has been disregarded, if the police later give him the *Miranda* warnings and seek to question him about unrelated matters. *Cf. Michigan* v. *Harvey*, 110 S. Ct. 1176, 1180 (1990); *Arizona* v. *Roberson*, 486 U.S. at 686 & n.6.

Petitioner's simple acceptance of counsel on the armed robbery charge provided no meaningful indication that he felt himself unable to answer questions concerning uncharged offenses without an attorney. Before questioning petitioner, the officers advised him of his right to counsel, and he waived that right. Because petitioner made no request that he not be interrogated without an attorney, the interrogation did not violate his right to remain silent or his right to counsel.[7]

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[7] Petitioner suggests (Pet. Br. 17-18) that his refusal to make a statement to the officers who escorted him from Omaha to Milwaukee, see J.A. 5-6, supports his claim that he later invoked his Fifth Amendment right to counsel. Contrary to petitioner's suggestion, his earlier request to remain silent was not a request for counsel and did not preclude the police from seeking to reinitiate questioning two days later. See *Michigan* v. *Mosley*, 423 U.S. at 104 n.10 (1975) (*Miranda* "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.'" (quoting *Miranda*, 384 U.S. at 474)).

b. This Court's decision in *Michigan* v. *Jackson*, *supra*, does not require a different result. *Jackson* held that the rule of *Edwards* prohibiting further police-initiated custodial interrogation following a request for counsel applies "when the basis for the claim is the Sixth Amendment." 475 U.S. at 636. The Court expressly declined to consider whether a defendant's request for counsel at an arraignment or similar proceeding also implicates his rights under the Fifth Amendment and *Miranda*. *Id.* at 630 n.4. Because petitioner's Sixth Amendment rights with respect to the uncharged offenses about which he was interrogated had not attached when he made the statements at issue here, *Jackson* does not govern this case. The Court in *Jackson* stated that a defendant's request for the appointment of counsel at his arraignment should be presumed to be a request for the lawyer's services at all critical stages of the prosecution, including subsequent custodial interrogation. 475 U.S. at 633. That proposition, however, is limited, by the Sixth Amendment rationale of the case, to interrogation regarding the charged offense. Nothing in *Jackson* suggests that a request for the appointment of counsel should be construed as an invocation of counsel not only with respect to the

charged offense, but with respect to all other possible subjects of interrogation as well. Cf. *Arizona* v. *Roberson*, 486 U.S. 675, 685 (1988) (Sixth Amendment right to counsel "arises from the fact that the suspect has been formally charged with a *particular* crime and thus is facing a state apparatus that has been geared up to prosecute him") (emphasis added).[8]

c. Nor is this Court's decision in *Arizona* v. *Roberson*, 486 U.S. 675 (1988), dispositive here. In *Roberson*, the Court extended the *Edwards* rule to interrogations conducted in the course of separate investigations. The important difference between this case and *Roberson* is that the defendant in *Roberson*, after being advised of his *Miranda* rights, replied that he "wanted a lawyer before answering any questions." 486 U.S. at 678. The defendant thus plainly invoked his right to have counsel present at any custodial interrogation. The Court concluded that this invocation should not be construed as "investigation-specific;" rather, it applied to "any questions the police wish[ed] to pose." *Id.* at 684. That conclusion

[8] Petitioner's reliance (Pet. Br. 24-25) on *Wyrick* v. *Fields*, 459 U.S. 42 (1982), is misplaced. The defendant in *Fields* was a soldier who had been arrested on a charge of rape. After retaining counsel, he requested that the military authorities conduct a polygraph examination. *Id.* at 43-44. The Court concluded that by requesting a polygraph examination, Fields had "initiated interrogation," and that he had made a valid waiver of the right to have counsel present during the examination and subsequent questioning. *Id.* at 47-49. The Court in *Fields* declined to address any issue arising under the Sixth Amendment, see 459 U.S. at 49, and nothing in its analysis of *Edwards* provides any support for petitioner's claim. The Court simply found that under all the circumstances, Fields had validly waived his right to the presence of counsel at interrogation. 459 U.S. at 47.

rested on the Court's view that a suspect, having once expressed his "unwillingness to answer any questions without the advice of counsel," *ibid.*, was unlikely to change his mind in the context of a different investigation. Here, in contrast, petitioner's acceptance of representation by counsel at the initial hearing on the armed robbery charge—unlike Roberson's statement that he "wanted a lawyer before answering any questions"—revealed nothing about his discomfort with the pressures of custodial interrogation. See *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) (*Edwards* and its progeny preserve the integrity of a suspect's choice to communicate with police only through counsel, but do not bar a suspect from making an initial choice as to whether he wishes to answer questions on his own).[9]

d. A principal concern of the Court in *Roberson* was the need for a bright-line rule to provide " 'clear and unequivocal' guidelines to the law enforcement profession." 486 U.S. at 681-682. That concern does not require the creation of a new prophylactic rule to address the circumstances of this case. Here, the Sixth Amendment, as augmented by *Michigan* v. *Jackson*, provides a bright-line rule: Once the ac-

[9] Contrary to petitioner's suggestion (Pet. Br. 26), the Court in *Butler* v. *McKellar*, 110 S. Ct. 1212 (1990), did not make an "implied finding" that the defendant in that case invoked his Fifth Amendment right to counsel by appearing with his attorney at a bond hearing. The only question before the Court in *Butler* was whether the rule announced in *Roberson* would be applied retroactively to cases on collateral review. 110 S. Ct. at 1216-1218. In any event, the Court stated that "[*a*]*fter* invoking his Fifth Amendment right to counsel, Butler retained counsel who appeared with him at a bond hearing on August 31, 1980." *Id.* at 1214 (emphasis added).

cused has requested or obtained counsel to represent him on a charged offense, the police may not initiate custodial interrogation concerning that offense. With respect to uncharged offenses, however, the accused remains in precisely the same position as any other suspect in custody.[10]

3. Because the prophylactic rules of *Miranda* and *Edwards* "sweep[] more broadly than the Fifth Amendment itself," *Oregon* v. *Elstad*, 470 U.S. 298, 306-307, 309 (1985), the Court has carefully weighed the benefits of creating such per se rules against the costs of restricting police investigations and excluding from evidence some voluntary confessions. See *Duckworth* v. *Eagan*, 109 S. Ct. 2875, 2883 (1989) (O'Connor, J., concurring); *New York* v. *Quarles*, 467 U.S. 649, 657 (1984); *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974). In this situation, the costs of creating a new prophylactic rule as an extension of *Edwards* outweigh any benefits such a rule might confer.

The costs of barring interrogation of all suspects in custody who are represented by counsel on other charges would be significant. This Court has recognized that "[a]dmissions of guilt are more than

[10] Moreover, applying *Edwards* in this context would not result in a perfectly bright line. In a recent decision, for example, the Court of Appeals for the Sixth Circuit assumed without deciding that *Edwards* applies where a suspect requests counsel on a charged offense, the charges are then dismissed (leaving no lawyer to consult), and police officers thereafter initiate custodial interrogation concerning an unrelated offense. *United States* v. *Throneburg*, No. 89-2111 (Dec. 17, 1990). Similar questions about the scope of *Edwards* would arise if the defendant were convicted of a charged offense, and then pursued a direct appeal or collateral attack on his conviction, or if the defendant were represented by counsel in civil litigation with the government.

merely 'desirable' * * *; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. at 426. If a defendant is not released on bail, the rule petitioner proposes would bar law enforcement officers from questioning him on any subject until after the trial. If the defendant is convicted, he is likely to remain in custody, and he may continue to be represented by counsel on appeal and perhaps during a collateral attack on his conviction. Consequently, a decision reversing the Wisconsin Supreme Court would effectively insulate many individuals charged with or convicted of one crime from any police-initiated interrogation concerning other wholly unrelated crimes for months or even years. Presumably, that principle would apply not only to crimes committed before the suspect was incarcerated, but to crimes committed during the period of his incarceration as well. Because many offenders commit multiple crimes, and because it is not unusual for a person under suspicion in connection with one offense to be a represented defendant in a separate case in the same or another jurisdiction, a rule that pulled the curtain down on all police-initiated custodial interrogation of such persons would impose a very great cost in restricting law enforcement efforts.

On the other side of the balance, it is hard to identify any significant benefits that would flow from petitioner's proposed rule. To be sure, petitioner's rule would reduce somewhat the risk of admitting statements from suspects who were subtly coerced into making them. But any per se rule barring some class of inculpatory statements would have that effect. The relevant inquiry is whether admitting

statements in a case such as this one would permit the police to overcome a suspect's expressed desire not to submit to interrogation without counsel. We do not believe it would. For purposes of determining the coercive effect of custodial interrogation, there is no material difference between a person who has been charged in one case and is a suspect in a second, and a person who is a suspect in both cases.

The fact that the first person had been charged in a separate case would appear to have little or nothing to do with that person's susceptibility to the coercive effects of custodial interrogation, and thus his need for greater safeguards than those provided by the procedures spelled out in *Miranda*. In fact, a suspect who is represented by counsel in a separate case may find it easier, rather than harder, to invoke the right to counsel in response to *Miranda* warnings, since that suspect already has a lawyer in another matter and can simply insist on that lawyer's assistance before questioning in connection with the separate, uncharged offenses under investigation. In that setting, there is no unfairness in treating the separately represented suspect the same as the unrepresented defendant and admitting any statements he makes after validly waiving his rights to silence and to the presence of counsel during questioning.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted.

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